11-20-1997

Fifth Place: Khalid Khawar v. Globe International, INC.

Jennie Goldsmith

David Levy

FIFTH PLACE

S054868

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KHALID IQBAL KHAWAR,	)	
	)	
Plaintiff and Respondent,	)	Court of Appeal,
	)	Second District
v.	)	2 Civil No. B084899
	)	
GLOBE INTERNATIONAL, INC.,	)	Los Angeles County
	)	Superior Court No. WEC 139685
Defendant and Petitioner.	)	
	)	

PETITIONER'S BRIEF ON THE MERITS

On Appeal From the Judgment of the Superior Court
of the State of California, County of Los Angeles
The Honorable Richard G. Harris, Judge

Review of the Decision of the Court of Appeal
Second District, Division Seven

Round #1: 6:00 P.M.
November 20, 1997

Jennie L. Goldsmith
David C. Levy
200 McAllister Street
San Francisco, CA 94102
(415) 565-4600

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS, Cont.

TABLE OF CONTENTS, Cont.

TABLE OF CONTENTS, Cont.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES, Cont.

TABLE OF AUTHORITIES, Cont.

S054868

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KHALID IQBAL KHAWAR	)	
	)	
Plaintiff and Respondent	)	Court of Appeal,
	)	Second District
v.	)	2 Civil No. B084899
	)	
GLOBE INTERNATIONAL, INC.	)	Los Angeles County
	)	Superior Court No. WEC 139685
Defendant and Petitioner.	)	
	)	

PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

Preliminary Statement

On August 31, 1989 Khalid Iqbal Khawar (Respondent) filed suit in Los Angeles Superior Court against Globe International, Inc. (Globe) and Ronald Morrow (Morrow), among others. (A.C.T. 137.)[1] In his suit, Respondent alleged that in reporting about a book by Morrow on the assassination of Robert Kennedy, Globe had re-published libelous, defamatory statements about him, damaging his name and reputation and causing him harm. (A.C.T. 139.) After a trial, a jury returned a special verdict for Respondent on April 15, 1994, awarding him $675,000 in compensatory damages,

[1] A.C.T. abbreviates Augmented Clerk's Transcript, C.T. abbreviates Clerk's Transcript, R.T. abbreviates Reporter's Transcript.

and $500,000 in punitive damages. (A.C.T. 2783, 2791.) The punitive damage award resulted from the jury's finding that Globe's conduct had been negligent and with actual malice. (A.C.T. 2791.)

At the beginning of the trial, a default judgment had been entered against Morrow, since he failed to make an appearance. During the jury trial, the judge made a determination that Globe's conduct had rendered it the original purveyor of libel. The default judgment against Morrow was thus vacated, leaving Globe as the only remaining defendant responsible for paying the judgment. See Khawar v. Globe Int'l, 54 Cal. Rptr. 2d 92, 98 (1996). In a special verdict, the jury found, inter alia, that the Globe article was an accurate and neutral report of Morrow's book. See id. However, the trial judge disagreed with the jury's finding and a decision was entered for Respondent. See id.

Globe appealed the judgment of the trial court. On June 5, 1996, Justice Gold, assigned to the Second District of the California Court of Appeal affirmed the decision below. See id. at 99. The Court of Appeal's opinion reached a number of issues of law, including Respondent's status as a public or private figure and whether Globe acted with malice. See id. The Court of Appeal did not reach the question of whether California had adopted the neutral reportage privilege. See id. at 98. On June

27, 1996, the Court of Appeal denied Globe's petition for re-hearing. See id. at 92.

On September 25, 1996, this Court granted Globe's petition for review. See Khawar v. Globe Int'l, 57 Cal. Rptr. 2d 277 (1996).

Statement of Facts

Khawar is a professional photographer, of Pakistani descent, who has been in the United States for many years. (R.T. 1330-36.) On June 4, 1968, he was photographing a speech by Senator Kennedy at the Ambassador Hotel in Los Angeles. (R.T. 1388.) During the event, Respondent stood on the stage very near the Senator while apparently documenting the event. (R.T. 1339.) Upon leaving the hotel, Senator Kennedy was shot and killed while passing through the kitchen. (R.T. 1341.) Sirhan Sirhan, a Jordanian student, was tried and convicted for the assassination of Senator Kennedy. (A.C.T. 143-44.)

After the assassination, Respondent remained at the scene, taking pictures of other victims. (R.T. 1341.) Respondent also attempted to enter the kitchen pantry area which was blocked by that time. Id. Respondent attempted to sell those pictures to Life magazine. (R.T. 1394.) There is no evidence Respondent was present in the kitchen where the assassination took place. (R.T. 702.)

In November, 1988, Robert Morrow wrote and published a book entitled "The Senator Must Die." (A.C.T. 140.) In this book,

Morrow put forth a theory that the Senator was not killed by Sirhan Sirhan, but by a group of Iranian secret police, acting on behalf of the Mafia in the United States. (C.T. 3145.) The book contained photographs and statements indicating Respondent was a participant in the assassination of the Senator. Id.

Morrow's book contained photos taken at the hotel the night of the assassination, one of which was reproduced in the Globe article. (R.T. 1357.) This photo depicted Respondent with an arrow pointed at his head. (R.T. 1359.) Respondent was identified in the book and Globe article as Ali Ahmand. Id.

The April 4, 1989 issue of The Globe magazine contained a brief report on Mr. Morrow's book, the photo of Respondent, and its allegations regarding the assassination of Senator Kennedy. (A.C.T. 139.) Respondent became aware of the Globe article through a former employee. (R.T. 1357.)

John Blackburn, the author of the article reportedly read Morrow's entire book, conducted an interview with the author, and attempted to contact the subject of Morrow's book. (R.T. 1092-93, 1121.) The attempt to contact the subject of Morrow's book consisted of Blackburn calling Los Angeles Directory Assistance and asking for a listing for Ali Ahmand. (R.T. 1120-21.)

Pursuant to a Pakistani custom, Respondent would at times go by his first two names, Khalid Iqbal, and at times use all three names, Khalid Iqbal Khawar. (R.T. 1383.) One Kennedy campaign worker said Respondent introduced himself as Ali Ahmad the night

of the Indiana primary. Id. Ali Ahmad was Respondent's father's name.

Respondent claims he suffered permanent and irreparable harm from the publication. (A.C.T. 140.) Respondent testified that his house was egged and his son's car was vandalized. (R.T. 1367.) Respondent claims to have received between 10 and 40 threatening calls between the time the Globe article was published and the filing of the lawsuit. (R.T. 1415.)

The assassination of Senator Kennedy took place in the early morning hours of June 4, 1968. (R.T. 1338.) Respondent left the United States for Pakistan in November of 1968. (R.T. 1351.) Respondent returned to the United States May 7, 1971. (R.T. 1353.) In 1977 Respondent moved to Bakersfield where he currently resides. (R.T. 1355.)

Respondent kept a picture of himself and Senator Kennedy, taken the night of the assassination. (R.T. 1357.) Respondent's picture was similar to that published by Globe. Id. Respondent hung the picture on the wall of his Bakersfield office and estimated that thousands of employees saw it there. (R.T. 1358-359.) Respondent also kept a Time magazine with his picture on the cover, depicting the assassination scene. (R.T. 1392.)

About four months after the publication of Globe's report, and less than a year after Morrow's book came out, Respondent filed suit against Morrow, Roundtable Publishing (the publisher of the book), and Globe. (A.C.T. 137-41.)

QUESTIONS PRESENTED

1. Is an individual a limited-purpose public figure when he voluntarily involved himself in a nationally televised event and later took affirmative steps to influence public opinion?

2. May Globe invoke the neutral reportage privilege as a complete or partial defense to Respondent's libel claim?

3. Can Respondent be awarded punitive damages without clear and convincing evidence of actual malice?

SUMMARY OF ARGUMENT

Respondent is a limited-purpose public figure in the controversy surrounding the assassination of Senator Kennedy. Under normal circumstances a farmer from Bakersfield, California would not be considered any sort of public figure. However unique facts in this case contribute to Respondent's rare status.

Respondent voluntarily thrust himself into the center of events the night Senator Kennedy was assassinated. He positioned himself on the podium, a central location in a nationally televised event. Respondent was not present in the pantry during the assassination, but tried unsuccessfully to push his way into the area, taking pictures of other victims which he later tried to sell. Finally, Respondent gave a television interview after filing suit against Globe, attempting to draw on his status to influence public opinion. Respondent benefitted from his orchestrated presence and close proximity to the assassination.

Regardless of Respondent's status, the neutral reportage privilege should apply in this case, providing a complete defense for Globe. Persuasive authority and sound public policy support the adoption of the privilege. The privilege is an important expression of the First Amendment. A reporter should not be denied the right to disseminate important information simply because somebody else reported it first.

The privilege adopted by this Court should apply broadly to public and private figures. It should not be limited to reports

on newsworthy subjects, because a defamatory report is newsworthy in itself. Nor should the privilege be limited to re-publications of material from trustworthy sources. Such a requirement impossibly burdens re-publishers and has significant potential to severely chill the dissemination of information.

Any decision by this Court carries substantial implications for public policy. Neutral reportage encourages authors of original works to take more care by clarifying the fact that they will be fully liable for damages caused by their works and by re-publications thereof. Most importantly, the privilege supports the basic goals of the First Amendment by encouraging the widest possible dissemination of important information for public consumption and judgment. Globe strongly urges this Court to adopt the privilege and thereby enhance and protect the First Amendment rights of all Californians.

Finally, under no circumstances should the Court award Respondent punitive damages. Clear and convincing evidence does not exist to support the finding that Globe acted with a reckless disregard for the truth, or knowledge that the article was false. Therefore, actual malice, which is required for punitive damages cannot be shown. Globe maintained journalistic standards by using disclaimers. Moreover, a failure to investigate is insufficient to support a charge of actual malice.

ARGUMENT

I. RESPONDENT IS A LIMITED-PURPOSE PUBLIC FIGURE BECAUSE HE THRUST HIMSELF TO THE FOREFRONT OF A PUBLIC CONTROVERSY AND LATER ATTEMPTED TO AFFECT ITS OUTCOME.

A. The Public Versus Private Figure Question Calls For De Novo Review.

New York Times v. Sullivan, 376 U.S. 254, 285 (1964), declared that appellate courts must independently examine the entire record, including statements at issue and the context in which those statements were made, in order to ensure libel judgements do not run afoul of constitutional principles. See also McCoy v. Hearst, 42 Cal. 3d 835, 841 (1986).

Respondent is a limited-purpose public figure. This determination is founded on voluntary acts Respondent undertook to influence events surrounding a public controversy. This issue is a question of law and fact, and thus a preliminary determination to be made by a judge. See Stolz v. KSFM 102 FM, 30 Cal. App. 4th 195, 203-04 (1994).

B. Finding Respondent To Be A Private Figure Would Set A Dangerous Precedent.

Respondent's status is crucial to this case since it determines whether negligence, or the higher standard of actual malice is necessary for a compensatory damage award. Furthermore, Respondent's status determination has a direct effect on the right to free speech. The First Amendment of the United States Constitution serves to protect the vigorous debate of public issues. Respondent in this case undertook voluntary

acts related to a public controversy. Free speech needs breathing space to flourish, and finding Respondent to be a private figure would encroach on this space, diminishing First Amendment protections. See New York Times, 376 U.S. at 272.

Respondent was involved in a very public controversy, took affirmative steps to thrust himself into the center of that controversy, and later tried to influence the outcome of issues related to that controversy. Thus, finding Respondent to be anything but a limited-purpose or involuntary public figure would cause publishers to steer clear of the unlawful zone to avoid any type of costly litigation, not just unfavorable judgements. See generally Gertz v. Robert Welch, Inc., 418 U.S. 323, 367-68 (1974) (Brennan, J., dissenting).

C. A Totality Of The Circumstances Test Indicates Respondent Is A Limited-Purpose Public Figure.

A review of the totality of the circumstances surrounding a controversy is required to determine whether an individual is a public figure, limited-purpose public figure, involuntary public figure, or private figure. See Reader's Digest Ass'n v. Superior Court, 37 Cal. 3d 244, 255 (1984).

The unique circumstances of this case warrant Respondent's designation as a limited-purpose public figure. Respondent was involved in the assassination of a United States Senator. This is an event that affected millions, shaped history, and continues to affect new generations.

Respondent is not accused of participating in the assassination for purposes of this litigation. However, Respondent did everything in his power to position himself in a central location the night of the assassination. After the assassination, Respondent remained at the scene, took pictures of other victims and attempted to enter the kitchen area where the Senator was shot. Respondent later attempted to sell those pictures. Following the assassination, he was invited to meet with the President of Pakistan, because he was "very prominent" and doing well in the United States. (R.T. 1412:9-13.)

Respondent became a limited-purpose public figure by virtue of his voluntary actions on the night of the controversy and thereafter. This is true regardless of whether Respondent intended to achieve such status. "When an individual undertakes a course of conduct that invites attention, even though such attention is neither sought nor desired, he may be deemed a public figure." McDowell v. Paiewonsky, 769 F.2d 942, 949 (3d Cir. 1985). In Marcone v. Penthouse Int'l Magazine For Men, 754 F.2d 1072, 1086 (3d Cir. 1985), an attorney was deemed a limited-purpose public figure for his association with bikers indicted for illegal drug activity. The court stated that actions of plaintiffs were looked at as well as intentions, with a course of conduct bound to attract attention being sufficient for public figure status. See id. This is also true of Respondent whose

actions thrust him so far into a controversy he could have been a witness in the criminal prosecution.

1. Gertz v. Robert Welch, Inc. provides the three original categories of public figures.

In Gertz, the Supreme Court described three categories of public figures. 418 U.S. at 342-45. A general public figure has reached a level of fame or notoriety which would make them a public figure in any instance. See id. at 342. A limited-purpose public figure is generally one who has attained a status or assumed a role of prominence in society, usually thrusting themself into a public controversy in an effort to influence events. See id. at 345. The third class of public figure, an involuntary public figure, could become a public figure through no purposeful actions of their own. See id. In all three cases, these figures "invite attention and comment." Id.

2. California courts look to the plaintiff's affirmative actions to determine plaintiff's status.

This Court in Reader's Digest Ass'n declared that an individual is not a public figure merely because that person is involved in a newsworthy controversy. 37 Cal. 3d at 254. Instead, a public figure must have undertaken voluntary acts to influence the resolution of the controversy in question. See id.

In Reader's Digest Ass'n, a foundation established as a drug rehabilitation center, Synanon Church, filed a defamation action against a magazine which claimed Synanon made minimal attempts to

rehabilitate drug addicts, yet still solicited funds for that purpose. Id. at 249-50. This Court held that Synanon was a public figure, not because of a particular controversy, but because of its repeated attempts to interject itself into the public arena. See id. at 255.

In Rudnick v. McMillan, 25 Cal. App. 4th 1183, 1190 (1994), a rancher was held to be a limited-purpose public figure because he encouraged a publisher to write about a public controversy. In Rudnick, a controversy arose over who was responsible for degradation of a ranch, Rudnick or the Nature Conservatory. Id. at 1186-90. Rudnick talked to a publisher in an attempt to defend himself and gain public favor, as did Respondent here. This case demonstrates that Respondent's affirmative actions are sufficient for limited-purpose public figure status.

These cases are important because they indicate that affirmative actions are enough for public figure status. These cases also demonstrate that circumstances of individual cases can lead courts outside of the Gertz model.

3. Lower federal courts have found it necessary to deviate from the classic Gertz model to account for unique facts.

In Brewer v. Memphis Publ'g Co., 626 F.2d 1238, 1257 (5th Cir. 1980), the court stated Plaintiff's status was difficult to classify, thus requiring a resolution outside of the traditional Gertz model.

Brewer was a singer and actress associated at one time with Elvis Presley. See id. at 1240. Years later she brought suit against a newspaper which published that she and Presley had a reunion. See id. The court held that Brewer was a public figure due to her own career and her association with Presley. See id. at 1257. Alone, Brewer had only a modest stature as an entertainer, with any career notoriety being of a local nature. See id. at 1248.

Brewer did not fit into the traditional Gertz model since she was "not tied to a particular controversy." Id. at 1257. However, the court declared that the Gertz categories were not exclusive, but rather examples of cases where plaintiffs invited "attention and comment." Id. at 1254 (quoting Gertz, 418 U.S. at 345).

Although Brewer is persuasive authority, it should be considered in the resolution of the present case due to similar circumstances. Both Brewer and Respondent were lesser known individuals associated with a very famous individual. Although Brewer may have had more of an association with Presley, Respondent's brief association with Senator Kennedy was far more controversial. If Brewer's mere association with Presley was enough to make her a limited-purpose public figure for articles concerning that association, Respondent's association with the Senator on the night of the assassination should likewise make him a limited-purpose public figure.

In Street v. National Broad. Co., 645 F.2d 1227, 1229-30 (6th Cir. 1981), Victoria Street was the prosecutrix and principal witness in a controversial rape trial involving racial overtones. Forty years later she brought suit against a broadcasting company that portrayed her in a negative light. See id. Street was held to be a public figure even though her status as a rape victim could not be voluntary. See id. at 1234. The court supported its holding by citing Street's access to channels of communication in the past and present. See id. at 1234-36.

Here, Respondent may not have chosen to be a limited-purpose public figure, but became one by the nature of his presence and actions on the night in question. Also, the nature of the controversy and of Morrow's accusations provided Respondent with access to channels of communication which he voluntarily used to his advantage.

4. Passage of time is not an issue.

Passage of time was not an issue in Brewer or Street and should not be one in the present case. Brewer stated that passage of time was not a problem with respect to articles discussing her association with Presley since his career and persona were still "phenomenal." 626 F.2d at 1257. The same is true about Senator Kennedy and this particular controversy since videos and photographs of that night are still displayed every anniversary of the assassination.

In Street, the court said passage of time does not "diminish the significance of events or the public's need for information." 645 F.2d at 1236. The court noted that Street still possessed access to channels of communication and said, "once a person becomes a public figure in connection with a public controversy, that person remains a public figure thereafter for purposes of later commentary or treatment of that controversy." Id. at 1235-36. This is particularly relevant here since time has not diminished the significance of Senator Kennedy's assassination and Respondent has had access to communication channels since the controversy originated. Furthermore, the Ninth Circuit has inferred in dicta that the passage of time has never been an issue in defamation suits. Partington v. Bugliosi, 56 F.3d 1147, 1152 n.8 (9th Cir. 1995).

D. Respondent's Placement Of Himself On The Podium And Actions Immediately Following The Assassination Constitute Voluntary Acts To Thrust Himself To The Forefront Of A Controversy.

It is settled law that voluntary acts are required to attain limited-purpose public figure status. See Reader's Digest Ass'n, 37 Cal. 3d at 254. The United States Supreme Court has generally ruled on what is insufficient for a voluntary act. See, e.g., Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979) (holding plaintiff could not be a public figure solely because he was a criminal defendant); Time, Inc. v. Firestone, 424 U.S. 448 (1976) (holding plaintiff was not public figure merely by being involved

in a newsworthy event, a private divorce); Gertz, 418 U.S. at 323 (holding plaintiff attorney was not a public figure by associating himself with a case sure to receive media exposure, yet he never personally talked to the press).

Respondent went beyond the acts described in the above cases. Respondent benefitted from his place on the podium, a place he actively sought where media exposure was more than foreseeable. After the assassination, Respondent did not move out of the way, but tried to enter the pantry, further involving himself in an obviously newsworthy event. As a result, Respondent is a limited-purpose public figure due to his involvement in the assassination, culminating in his contact with the media.

E. Respondent's Press Interview Constituted A Direct Attempt To Influence Public Opinion In A Public Controversy.

In Denney v. E.M. Lawrence, 22 Cal. App. 4th 927, 930 (1994), Roger Denney's identical twin brother, Rodney, killed his wife and was convicted of manslaughter. The media intensely covered the crime. See id. at 931. Roger Denney sued Lawrence for writing a letter to a newspaper, later printed, which erroneously named him as the murderer. See id. at 932.

The court held Denney was a limited-purpose public figure because he gave press interviews, promoted a version of the case favorable to his brother, and spoke to the press at a time when his brother would not, thus making his information particularly

relevant and influential. See id. at 935-36. According to the court, giving press interviews could not be considered anything but voluntary since no one forced Denney to talk to the press. See id. at 935. Denney was a limited-purpose public figure because he "thrust himself into the limelight and initiated public debate on an issue of obvious public interest." Id. at 936.

Like Denney, Respondent voluntarily gave a press interview. No one forced Respondent to go on a television program and give his side of a story in an attempt to influence public opinion. The principles of Denney must be applied in this case to prevent an individual who uses his access to the media for his own benefit from later hiding behind his private figure status. An individual who voluntarily seeks out the media assumes the risk of public scrutiny. Although Denney gave more interviews than Respondent, the distinction is unimportant in light of Respondent's clear voluntary attempt to influence public opinion. See id.

F. The Opinion Below Failed To Take Into Account Relevant Factors.

The opinion below did not look at all of Respondent's actions, or consider the unique nature of this case. The court said Respondent's "affirmative actions, namely, attendance at the Kennedy campaign rally and appearance on the podium near Senator Kennedy, do not rise to the level of action by which the

purported public figure thrust himself into the forefront of a public controversy." Khawar, 54 Cal. Rptr. 2d at 101. This statement does not take into account Respondent's actions after the fact, or his media appearance. The opinion below also erroneously indicated that passage of time would affect Respondent's status, contrary to case law.

G. If Not A Limited-Purpose Public Figure, Respondent Is An Involuntary Public Figure.

In Dameron v. Washington Magazine, 779 F.2d 736 (D.C. Cir. 1985), Dameron was held to be an involuntary public figure. He filed a defamation suit against a magazine that claimed air traffic controllers were partially responsible for a crash that killed 92 people. See id. at 738. He was the only air traffic controller on duty at the time of the crash. See id.

Aspects of Dameron are very similar to this case. The accusations were similar in magnitude, Dameron accused of being partly responsible for 92 deaths, Respondent accused of being partly responsible for the death of a well-loved and well-known American leader. Both articles were based on only one source. See id.; (R.T. 1092-93.) Both articles failed to mention the plaintiff's name. See id. at 742; (C.T. 3145.)

The Dameron court distinguished Firestone as a divorce proceeding thus being inherently private, even if the public was interested. Id. By contrast, Dameron was involved in a public controversy from the very beginning (public safety), as was

Respondent. See id.; (R.T. 1341-42.) Like Dameron, Respondent's case is one that is exceedingly rare due to the extreme nature of the public controversy. Through his in-depth involvement in such a great controversy, Respondent undeniably became at least an involuntary public figure.

II. PETITIONER URGES THIS COURT TO ADOPT THE NEUTRAL REPORTAGE PRIVILEGE.

A. De Novo Review Is The Appropriate Standard.

Globe urges this Court to adopt the "neutral reportage" privilege that has been adopted in other jurisdictions. See, e.g., Edwards v. National Audubon Soc'y, Inc., 556 F.2d 113 (2d Cir. 1977); Barry v. Time, Inc., 584 F. Supp. 1110 (N.D. Cal. 1984); Ward v. News Group Int'l, 733 F. Supp. 83 (C.D. Cal. 1990). In the opinion below the Court of Appeal, despite lengthy discussion of the fact that California has not adopted the privilege, explicitly did not reach this issue. Khawar, 54 Cal. Rptr. 2d at 98.

As a question of first impression concerning the adoption of a general legal principle for California, this is a pure question of law. "[T]he question . . . requires an 'exercise [of] judgment about the values that animate legal principles;' hence that question is one of law which we review de novo." Smith v. University of Cal. Regents, 56 Cal. App. 4th 979, 984 (1997) (quoting Ghirardo v. Antonioli, 8 Cal. 4th 791, 800-01 (1994)). Therefore, the privilege issue requires de novo review.

B. Persuasive Authority Supports Adoption Of The Privilege.

"In one of the few instances where folk wisdom has been directly enshrined in the common law, the apothegm '[t]alebearers are as bad as talemakers' appears as the rule '[o]ne who re-publishes a libel adopts it as his own.'" James E. Boasberg, With Malice Toward None: A New Look at Defamatory Re-publication And Neutral Reportage, 13 Hastings Comm. & Ent. L.J. 455, 456 (1991). While perhaps wise in some instances, this paradigm has for many years proven troublesome for courts and legal commentators. The solution to this important constitutional problem is found in the neutral reportage privilege.

1. The original, narrow Edwards privilege is a basis from which this Court may begin in drawing California's privilege.

The privilege finds its original legal footing in the Second Circuit's opinion in Edwards, 556 F.2d at 113. The Edwards court adopted the privilege with some important limitations. Id. at 119-20. Edwards required that the charges reported upon be made by a "responsible, prominent organization," be made against a public figure, and be about a newsworthy event. Id. The re-publication itself was required to be accurate, neutral and disinterested. See id. Other jurisdictions that have adopted the privilege have modified or eliminated some requirements. See, e.g., Barry, 584 F. Supp. at 1110 (applying privilege to limited-purpose public figure party to controversy, eliminating

trustworthy source requirement); Ward, 733 F. Supp. at 83 (applying privilege to limited-purpose public figure generally); April v. Reflector-Herald, 46 Ohio App. 3d 95, 98 (1988) (applying privilege to private figure party to public controversy).

2. Even the narrowest reading of the privilege does not require that the re-publisher believe in the truth of the original report, nor that re-publications literally repeat the original.

The Edwards court held that the First Amendment forbade requiring the press to suppress reporting of newsworthy statements simply because somebody else had reported them first. Id. at 120. The court held further that the secondary reporter need not have great confidence nor undertake great investigation into the validity or truth of the matters asserted. See id. "[T]he First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity." Id. Thus, even if the secondary reporter has serious personal doubts about the truth of the original report, he is constitutionally protected if he believes that his re-report is accurate and neutral.

The Edwards court also held that "literal accuracy is not a prerequisite." Id. The secondary reporter simply must believe in good faith that his report accurately represents the original publication. See id. Strict requirements on the secondary reporter to ascertain the truth or accuracy of the original

report only serve to chill the dissemination of information. Moreover, such requirements do not make proportional strides toward protecting the reputations of those reported upon.

3. Recent precedent supports applying the privilege to limited-purpose public and private figures.

The privilege should apply to non-public figures as well as public figures. The Edwards court did not address reports about non-public figures, and thus its holding has been narrowly interpreted. See id. at 120. Later courts, including the Federal District Courts for the Northern and Central Districts of California, have explicitly broadened the Edwards privilege by applying it to reports about limited-purpose public figures. See Barry, 584 F. Supp. at 1110; Ward, 733 F. Supp. at 83.

In Barry, the court applied the privilege to statements about a basketball coach made by a former player and re-reported in a national magazine. Id. at 1112. The court reasoned that the public has the right to know about and make informed judgments about controversial issues which are of general interest. See id. at 1125.

The Barry court considered the coach a limited-purpose public figure. Id. at 1118. However, the court stated in dicta that "the rationale justifying the . . . privilege may apply equally to [private] plaintiffs." Id. at 1127. Furthermore, the Barry court expressed doubt about the common interpretation that the Edwards privilege applied only to public figures. See id.

"It has never been entirely clear . . . whether the [Edwards] privilege would apply if the subject of the defamation were a private individual." Id. at 1127 n.20.

The limited-purpose public figure in Barry is rather similar to Respondent. Moreover, the issues in both cases are controversial and of general interest. Therefore, it is appropriate for this Court to follow Barry and apply the privilege here. However, should the Court find that Respondent is a private figure, application of the privilege is not foreclosed.

The Ohio Court of Appeal has explicitly applied the privilege to a private figure. See April, 46 Ohio App. 3d at 98. The court saw "no legitimate difference between the press's accurate reporting of accusations made against a private figure and those made against a public figure, when the accusations themselves are newsworthy and concern a matter of public interest." Id.

Similarly, the Court here should construe the privilege broadly to protect re-publication of reports about private as well as public figures. If the re-publication is accurate and neutral, then the privilege should apply. Limiting it to reports about public figures limits dissemination of information, contrary to the fundamental tenets of the First Amendment. The knowledge that a reputable and possibly prominent individual or organization has attacked the character of a private individual

is critical to allow the public to gain insight into the methods and character of that author or organization. Such an attack may be more newsworthy than a story about a public figure. The privilege should apply to private and public figures alike.

4. The privilege should not constrict First Amendment freedom by requiring re-publishers to ascertain a source's trustworthiness before it is applicable.

The Barry court wrote forcefully against requiring the original reporter to be trustworthy for the privilege to apply. 584 F. Supp. at 1126. The court felt that the First Amendment requires the public to be the "arbiters of how 'trustworthy' a source is," because forcing that duty on a re-publisher is likely to have a chilling effect. Id. "A much more sensible approach is to extend the [privilege] to all re-publications of serious charges . . . regardless of the 'trustworthiness' of the original defamer." Id.

Globe urges this Court to follow the Barry court's lead in cleansing the privilege of this unnecessary and unwise requirement. The trustworthiness requirement places onerous, unfair, and perhaps impossible burdens of time, cost and feasibility on the re-publisher. "[E]ven if [a secondary reporter] does not fear ultimate liability, the mere threat of costly and time-consuming inquiry into his state of mind may cast a chilling effect on publication." Id. at 1125. Moreover, trustworthiness is inherently a subjective quality, the determination of which should be left to the public. See id. at

1126-27. Elimination of this requirement allows for wider dissemination of information, in furtherance of the purposes of the First Amendment. The trustworthiness requirement does not belong in California's neutral reportage privilege.

5. Inter-jurisdictional consistency and recent judicial trends support adoption of the privilege.

Consistency of legal doctrines across various forums is of great value to litigants. Inter-jurisdictional consistency is particularly important for news publications where editorial decisions having significant legal ramifications must be made quickly. Fear of libel resulting from uncertainty about the law results in self-censorship, opposite the goals of the First Amendment. Currently the neutral reportage landscape is uneven. Two of four federal district courts in California have adopted the privilege, while the state courts, of course, have not.[2] Thus, improving consistency across jurisdictions provides yet another solid reason for this Court to adopt the privilege.

A growing range of persuasive authority supports adoption and/or application of the privilege.

---

[2] The United States Supreme Court has not decided this issue. In Harte-Hanks Communications, Inc., v. Connaughton, 491 U.S. 657, 660, 694 (1989) (Blackmun, J., concurring), the Court, noting previous adoption of the privilege by numerous other courts, alluded to a desire to address the issue and perhaps to adopt the privilege, at least with respect to public figures. However, because the defendant did not raise the privilege as a defense, the Court sidestepped the issue. See id. The fact that the Supreme Court did not speak out against the privilege, and was at a minimum neutral to its potential adoption, should provide further support for this Court in adopting the privilege for California.

> In the last few years . . . courts have . . . recognized the defense, either through an express adoption of it or through a positive consideration of it in dicta. Many courts, too, have broadened the privilege far beyond the contours created by a narrow reading of the Edwards decision. These courts . . . have read the Edwards decision as a broad protection of . . . the [F]irst [A]mendment.

Scott E. Saef, Neutral Reportage: The Case For a Statutory Privilege, 86 Nw. U.L. Rev. 417, 419-20 (1992). Numerous federal courts and approximately 20 state courts have adopted or applied some form of the privilege since Edwards was decided in 1977.[3,4]

In summary, Globe urges this Court to follow this significant body of persuasive authority and adopt a privilege that is broadly applicable and protective of the First Amendment rights of Californians.

---

[3] See, e.g., White v. Fraternal Order of Police, 909 F.2d 512, 528 (D.C. Cir. 1990) (holding that although announcer used "dramatic intonations" privilege could still apply); Price v. Viking-Penguin, Inc., 881 F.2d 1426, 1434 (8th Cir. 1989) (holding recitation of official action protected if accurate, even when results are clearly harmful); Medico v. Time, Inc., 643 F.2d 134, 145-46 (3d Cir. 1981) (holding that consistency required application of existing state law privilege).

[4] See, e.g., Gist v. Macon County Sheriff's Dept., 284 Ill. App. 3d 367, 379 (1996) (holding fair and accurate reports of government proceedings or activities of public figures protected, even if re-publication lacked literal accuracy); Costello v. Ocean County Observer, 136 N.J. 594, 626 (1994) (stating that "judges are ill equipped to act as city editors" thus publisher must be protected because of great public interest in receiving information); Herron v. Tribune Publ'g Co., Inc., 108 Wash. 2d 162, 171 (1987) (applying privilege where re-publisher knows that original accusations are false and the accused has denied the allegations).

D. Public Policy Supports Adoption Of The Privilege.

In addition to the precedential reasons noted above, there are numerous policy considerations that compel this Court to adopt the privilege.

1. The privilege is necessary to further the First Amendment goal of the widest possible dissemination of information.

"The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them." Edwards, 556 F.2d at 120. The free flow of information lies at the very heart of the First Amendment, and of the privilege. Failure to adopt the privilege restricts this flow, and in doing so diminishes the vitality of our society's discourse and debate about important issues. See id. Simply because a reporter may not be the original investigator of a story, or may even himself have doubts about it's validity, he should not be restricted by the fear of libel from accurately and neutrally re-reporting that information. See id.

Failure to adopt a broadly applicable privilege would result in a law that protects "mainstream" re-publishers, while denying those with narrower audiences and fewer resources the full protection of the First Amendment. This would reduce the diversity of information available for public consumption and evaluation.

The case at hand presents a clear example of this problem. Globe is not a mainstream news source, and the assassination of Robert Kennedy, while undoubtedly a major event in American history, may not generally be newsworthy today. However, this topic is extremely interesting to a segment of the population. Therefore, in that context, Morrow's book is entirely newsworthy. The fact that it may not be newsworthy in the broader context of society, should not mean that a report about it deserves any less constitutional protection, or should be any less widely disseminated than a report about the latest breaking stories of general interest.

Limiting the privilege to reports about public figures similarly denies a segment of the population the First Amendment's protections. An author or organization that irresponsibly publishes libelous statements about private figures should be exposed as such. That event is newsworthy in itself. See id.; see also Barry, 584 F. Supp. at 1127. The very private figure who is initially libeled is done a disservice if a narrow privilege results in his being denied a chance to have the libel that has been bestowed upon him identified as such. "A member of a civilized society should have some measure of protection against unwarranted attack upon his honor, his dignity and his standing in the community." Edwards, 556 F.2d at 122 (quoting T. Emerson, Toward a General Theory of the First Amendment at 69 (Vintage 1967)).

If the statements in Morrow's book are indeed libelous, Respondent should welcome Globe's accurate and neutral exposé. The more widely the book is reported on, the greater his opportunity to refute the statements made therein. The value of the privilege in supporting the fundamental purposes of the First Amendment is directly proportional to the freedom with which it is applied by this Court.

2. The privilege encourages responsible reporting since a neutral re-publication is protected.

Adopting the privilege would encourage authors of original works to take more care in their reporting and investigation. See generally Saef, Neutral Reportage: The Case For a Statutory Privilege, at 426. As it stands now, an irresponsible author whose defamatory work is re-published can pass on the financial liability to the re-publisher(s). Following adoption of the privilege, authors of original works would lose this perverted legal protection and thus be forced to take full responsibility for any defamatory remarks.

This idea works in proportion to the potential for damage to the reputation of an individual or organization. The more widely interesting or sensational the subject of an article, the more likely it is to be re-published. Under the current legal framework, the fact that the original libel is widely disseminated through re-publication means the original purveyor of the libelous statements is financially insulated. Following

adoption of the privilege, the author of a highly defamatory article that attracts significant re-publication will be subject to great liability because he will have nobody with whom to share the burden of his bad deed. Defamation is most properly addressed and prevented at the original source.

The case at hand exemplifies this justification for the privilege. The suit against Morrow, the original author of the allegedly defamatory work, has been dismissed, and only the innocent re-publisher, Globe, remains potentially liable. The absence of a privilege has allowed the original author to publish what may be defamatory and damaging statements with impunity. The privilege works to eliminate this injustice. The privilege serves both sides of the First Amendment balance; it protects the free dissemination of information and the reputations of innocent individuals.

E. Adoption Of The Privilege Provides Globe A Complete Defense To Respondent's Libel Claim.

The privilege provides a complete defense to Respondent's charges. The libel allegedly committed by Globe stems from its accurate and neutral re-publication of statements and allegations made in an original work by a reputable author. Thus, the Globe article is not libelous. Moreover, it repeatedly attributes the allegations reported upon to the original, reputable author, allowing any reader to properly identify the original source of the allegations.

1. The Globe article was a neutral and accurate report of Morrow's book.

The Globe article was a neutral and accurate report of Morrow's original allegations. Of the 16 paragraphs in the article, 7 are direct quotations and 2 are for the sole purpose of attributing the information therein to Morrow. (C.T. 3145.) Perhaps more importantly, at trial the jury found in Question No. 7 of the special verdict that the report was accurate and neutral. (A.C.T. 2782.) Although it was ultimately irrelevant to the decision, it is important to note that the original trier of fact who saw the evidence and heard the witnesses found that Globe's report was neutral and accurate. Although de novo review does not require deference to the factual determinations below, it does not mean that they must be completely ignored.

Despite the seemingly clear resolution of this point, the court below found that Globe's inclusion of a picture from Morrow's book and addition of a caption and an arrow pointing to Respondent rendered it the original purveyor of libel. Khawar, 54 Cal. Rptr. at 98 & n.1. The Edwards court warned that re-publishers who "in fact espouse[] or concur[] in the charges made by others, or who deliberately distort[] these statements to launch a personal attack" may not avail themselves of the privilege. 556 F.2d at 120. Adding a caption and an arrow to a picture from the original work is far from espousing, concurring or distorting. These additions clarify the original report and

avoid possible defamation of other people shown in the picture, who readers could mistake for Respondent. Moreover, the caption itself states that the allegations to which the picture pertains were made by "author Robert Morrow." (R.T. 3415.)

Determinations of the neutrality and accuracy of a re-publication must be made in the context of the whole article. See Ward, 733 F. Supp. at 83. "The [reviewing] [c]ourt should consider the article as a whole and read the entire communication in context." Id. When taken in the context of the whole article, it is clear that the annotation and the caption do nothing to show that Globe supports or embraces Morrow's allegations. In fact, considering the article as a whole reveals further that Globe's additions were clarifications of materials set forth in the original publication, and that they actually protected others in the picture from potential defamation. In all respects, Globe's article was an accurate and neutral report of Morrow's book.

2. Should this Court decline to broaden the privilege in the various ways discussed above, it still serves as a defense to Respondent's allegations.

Even if this Court adopts a fairly restrictive privilege, Globe is protected. The trial court considered the neutral reportage defense and submitted instructions to the jury for a decision pertaining thereto. (C.T. 2832.) The privilege offered to the jury was very restrictive. To apply the privilege, the jury had to find that, in addition to the report being neutral

and accurate, 1) Morrow was a responsible and prominent source, 2) the statements reported on were newsworthy, and 3) the reporter (Blackburn) believed reasonably and in good faith that his report accurately conveyed the statements made. (C.T. 2832.) The jury found that Globe's conduct met each of these requirements and thus the privilege should apply. The fact that Globe's report fit within this narrowly-defined privilege, and the fact that the court below was willing to go so far as to submit these instructions to the jury, weigh heavy in support of Globe's privilege defense.

As shown in Part I of this brief, Respondent is a limited-purpose public figure. However, the privilege should apply to reports about private figures as well. See, e.g., Barry, 584 F. Supp. at 1126; April, 46 Ohio App. 3d at 98. This approach best serves the First Amendment by allowing for the maximum dissemination of information about important events and controversies.

> This limitation upon the privilege has met with severe criticism from commentators who note that under some circumstances the public may have a greater interest in knowing that a prominent organization or individual had made serious charges against a private individual, since the making of such charges against a defenseless plaintiff gives the public relevant insight into the defamer's character.

Barry, 584 F. Supp. at 1127 (emphasis added). Thus, the status of Respondent should not be a factor in this Court's adoption or application of the privilege.

III. PUNITIVE DAMAGES CAN NOT BE AWARDED WITHOUT CLEAR AND CONVINCING EVIDENCE OF ACTUAL MALICE.

When the speech in question involves a matter of public concern, Respondent must prove actual malice to recover punitive damages.[5] See Brown v. Kelly Broad. Co., 48 Cal. 3d 711, 747 (1989) (quoting Gertz, 418 U.S. at 347, 349). This is true regardless of whether he is a public or private figure. See id.

Constitutional malice requires a showing of subjective doubt on the part of the publisher. See Gertz, 418 U.S. at 349. In this case there is no evidence Globe entertained serious doubts. In fact, the publisher responded to the article by making the language stronger. This is evidence of belief and excitement rather than doubt. Further investigation would have been a sign of doubt.

Gertz held states were not permitted to allow recovery of punitive damages without a showing of actual malice for three reasons. Id. First, defamation is an oddity of tort law where compensatory damages are awarded without a showing of harm since it is assumed from the publication. See id. This means juries are unlimited in what they can award as compensatory damages and compounds the potential for inhibition of the vigorous exercise of the First Amendment. See id. Second, punitive damages are

---

[5] Actual malice, also called New York Times malice or constitutional malice is: reckless disregard for the truth, or knowledge of falsity established when "the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

dangerous because they provide the jury with an avenue for punishing unpopular publications rather than false facts. See id. This too, unnecessarily exacerbates the danger of media self-censorship. See id. Finally, states have no interest in securing huge awards "far in excess of any actual injury." Id.

The Gertz Court was attempting "to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment." Id. The Court stated "[i]t is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury." Id.

A. Punitive Damages Require De Novo Review.

"Contrary to the normal rule of appellate review, a reviewing court must independently review all the evidence on the issue of malice." Kelly, 48 Cal. 3d at 747 (citing Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 510-11 (1984)). This principle is based on the competing interests of protection of reputation and freedom of speech and was reaffirmed in Harte-Hanks Communications, 491 U.S. at 686.

B. There Is Insufficient Evidence To Affirm The Opinion Below On The Existence of Malice.

Respondent is required to prove malice by clear and convincing evidence, a higher standard than most civil actions, due to the importance of the constitutional protection. See New York Times, 376 U.S. at 285-86. Furthermore, in this

constitutional area, jury verdicts are not persuasive because of the danger juries will decide an issue based on sympathy or distaste rather than constitutional principles. See Hearst, 42 Cal. 3d at 844. Here, this standard has not been met.

Globe had a right to tell its readers about Morrow's theory. A conspiracy theory is unique in that it is difficult to prove. Globe could not even verify that Morrow once worked for the CIA since the CIA would never respond to such an inquiry. (R.T. 846.) Morrow is no longer party to this litigation, yet Globe is allegedly liable for merely reporting the existence of his theory to the public. Globe made every effort to distance itself from the truth or falsity of Morrow's theory. At trial, Respondent's expert cited Globe's use of the word "revealed" in its headline as irresponsible, yet he also admitted this could be attributed to a journalistic prerogative or style. (R.T. 865-68.) These are critical areas of First Amendment protection. These facts do not and cannot amount to actual malice.

The opinion below stated that Globe engaged in misconduct in which a reasonable person would not engage. See Khawar, 54 Cal. Rptr. 2d at 110. This comment implies negligence, not constitutional malice, which requires that the publisher entertained serious doubts about the veracity of a publication. The opinion below also states that Morrow's assertions are improbable on their face, providing circumstantial evidence that the re-publishers had doubts. This is a circular argument that

provides no evidence of the re-publisher's subjective state of mind. Neither of these reasons provide clear and convincing evidence of malice.

C. Failure To Investigate Is Insufficient To Prove Actual Malice.

Malice is not established by showing speculative or sloppy reporting, a failure to contact the subject of a story for his or her side, or factual error alone. See Weingarten v. Block, 102 Cal. App. 3d 129, 147 (1980). A failure to investigate fully could be a sign of negligence, but not a sign of knowledge of falsity or reckless disregard as required for actual malice.

A failure to investigate may reflect the subjective attitude of the publisher. See Reader's Digest Ass'n, 37 Cal. 3d at 258. However, any failure to investigate here was a direct response to Globe's perception that such research was unnecessary due to the use of disclaimers in the re-publication and the reputation of the original author. Globe's actions infer confidence in their article, not doubt.

Robert Morrow believed his source. The First Amendment is founded in the value of expressing and airing ideas that are a matter of public concern. Actual malice encourages open discussion by tolerating "silly arguments and strange ways of yoking facts together in unusual patterns." Street, 645 F.2d at 1237. No one would suggest Respondent was risking his reputation by putting a picture of himself and Senator Kennedy on display in

his semi-public office. However, the facts in this case are so unique that without Respondent's voluntary act he may never have been recognized. An award of punitive damages in this case would protect those who want to hide behind private figure status at the expense of the public's right to hear discussion on matters of public concern. This would be a dangerous encroachment on constitutional protections.

CONCLUSION

Respondent is a limited-purpose public figure. He voluntarily thrust himself into the center of controversial events. He used his presence at the assassination to elevate his status and later used a press interview to influence public opinion. Due to the unique facts of this case, Respondent is a limited-purpose public figure, although not of the typical Gertz model.

Regardless of Respondent's status, Globe should be protected by the neutral reportage privilege. Many courts have concluded that the privilege is an appropriate and responsible way to uphold and further the goals of the First Amendment. Numerous legal and public policy reasons compel this Court's adoption of the privilege. It would be a bold statement of law and policy, and a valuable safeguard for the First Amendment rights of Californians.

This case presents an excellent opportunity for the proper and just application of the privilege. Globe's report was

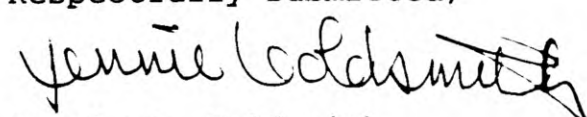
accurate and neutral. The death of Senator Kennedy is a great public controversy. Morrow is a reputable author. Therefore, the privilege provides a complete defense to Respondent's claims.

Finally, the existence of actual malice is not supported by clear and convincing evidence as required for punitive damages. Such an award here would improperly hold protection of reputation above the constitutional command of free speech.

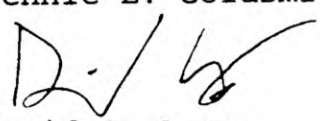
In light of the foregoing, Globe respectfully requests that this Court reverse the Court of Appeal on the issues of Respondent's status, application of the neutral reportage privilege, and the propriety of punitive damages.

Dated: November 20, 1997

Respectfully submitted,



Jennie L. Goldsmith



David C. Levy

Counsel for Petitioner
Globe International, Inc.